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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1061~~ 167

MILTON J. HARRIS,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May it Please This Honorable Court:

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Appendix, Page 1) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1957. Petition for Rehearing was timely filed, which Petition was denied on May 8, 1957.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

I

Where an accused is, by indictment, charged with a violation of Section 145 (b), Internal Revenue Code 1939, "by filing and causing to be filed . . . a false and fraudulent income tax return . . ."; does the indictment state ANY offense against the United States, in the absence of allegations of aggravating circumstances?

II

Where, in a case involving the liberty and property of an accused, a substantial question, challenging the jurisdiction of the District Court, is raised in the Court of Appeals on a petition for rehearing (although preserved in the District Court), was it not error and a serious departure from the accepted and usual course of judicial proceedings for the Court of Appeals summarily to refuse to consider such question?

III

Where the petitioner was charged with income tax evasion for failure to report one single item of income in the amount of $45,000, may the petitioner properly be convicted of the felony proscribed by Section 145(b) Internal Revenue Code 1939, where this same item was reported on the income tax return of petitioner's wholly owned real estate corporation?

IV

Did a sua sponte remark by the Trial Court relative to the jury's recommending sentence have the effect of inducing a verdict and depriving petitioner of due process of law and his rights to trial by an impartial jury?

STATUTES INVOLVED IN QUESTION I

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) **Failure to Collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts

in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 145).

SEC. 3616. PENALTIES.

Whenever any person —

(a) **False returns.** Delivers or discloses to the collector or deputy any false or fradulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

(28 U.S.C. 1946 ed., Sec. 3616.)

STATUTES INVOLVED IN QUESTION II

Rule 52, Federal Rules of Criminal Procedure

Harmless Error and Plain Error

* * * * *

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed

> although they were not brought to the attention of the court.

(Federal Rules of Criminal Procedure, Title 18 U.S.C.)

Rules of the United States Court of Appeals for the Fifth Circuit, Rule 24. 2. (b):

> "A specification of the errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. Errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not specified."

STATEMENT

On February 23, 1953, an indictment (R. 1) was filed in the United States District Court, charging the petitioner with the felony of income tax evasion, in violation of Section 145 (b) Internal Revenue Code 1939. The act by which this felony was alleged to have been committed allegedly occurred on March 7, 1947, and consisted of "filing and causing to be filed . . . a false and fraudulent income tax return . . ." (R. 1).

Petitioner moved to dismiss the indictment for failure to state an offense (R. 273). This motion was denied by the trial court (R. 6).

Upon petitioner's motion, the trial court ordered the indictment to be supplemented by a bill of particulars (R. 6). This bill of particulars (R. 9) (considered in connection with petitioner's income tax return) defined the

issues in the case: the respondent thereby contending that petitioner had failed to report one specific item of income, to wit: a real estate commission in the sum of $45,000.00. No other item of income was questioned, according to the bill of particulars, and petitioner's expenses were "allowed per return" (R. 9).

The evidence upon which petitioner was convicted may be summarized as follows:

During the calendar year 1946, through petitioner's efforts, a real estate commission in the sum of $45,000.00 was earned. This item did not appear on petitioner's individual income tax return, but it **was reported** by the petitioner in the return of the M. J. Harris Co., petitioner's wholly-owned real estate corporation (Govt. Ex. 2, line 14). Over objection, the respondent was also allowed to show that petitioner had not filed individual income tax returns for years **prior** to the year under prosecution (R. 52. 59, et seq.).

The record shows that the jury retired at 4:10 P.M. and at 5:30 P.M. on the same day had returned for further instructions, and the following colloquy ensued:

"The Foreman:

Judge, we have a question as to a verdict. Is it all right to ask this in open Court?

The Court:

Yes, and if I can answer it I will do so. If I cannot answer it I will tell you I cannot, and the reasons:

The Foreman:

We are in a quandry whether we must render a verdict of guilty with willful intent, or whether or not we can render a verdict of guilty without willful intent. Would you make that clear?

The Court:

If there is no willful intent you cannot find him guilty. You can recommend as to sentence if you want to, but beyond that you cannot do anything.

The Foreman:

Thank you, Your Honor. You have answered our question. (emphasis supplied) (R. 190-191)

Thereafter the jury, not having reached a verdict, were put away for the night. The next day the jury likewise returned for additional instructions (R. 133-210). During deliberations, which consumed the major portion of the day, the questions asked by the jury clearly showed a difficulty in agreement and a concern with whether the degree of culpability was sufficient to justify conviction. (R. 204).

Finally, after the Court gave the Allen "dynamite" charge (Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L.Ed. 528 (1896) in addition to other instructions, the jury at 3:59 p.m. of the second day returned its verdict as follows:

"We, the jury, find the defendant Guilty as charged with a **strong** recommendation for clemency." (R. 217).

The trial court, upon the verdict of the jury, sentenced petitioner to six months imprisonment and imposed a fine of $2,000 (R. 218).

Appeal was taken to the United States Court of Appeals for the Fifth Circuit, which, on April 8, 1957, rendered its opinion (Appendix 1), affirming the District Court. Petitioner, within the time prescribed, filed his petition for rehearing, together with a motion to correct record (R. 271), for the purpose of presenting to the Court of Appeals substantial questions which had arisen by reason of the Honorable Supreme Court's grant of Certiorari in the cases of **Costello v. United States**, (Docket No. 666, Oct. Term 1956), 25 L.W. 3222, and **Achilli v. United States** (Docket Nos. 430 and 834, Oct. Term 1956), 25 L.W. 3252. Both of these orders, occurring respectively on January 29, 1957, and March 5, 1957, were subsequent to the preparation of appellant's brief and specifications of errors in the court of appeals. The Court of Appeals, by its orders dated May 8, 1957 (R. 275), indicated that it had not only rejected petitioner's contentions, but specifically had declined to consider them.

REASONS FOR GRANTING THE WRIT AS TO QUESTION I

Now that the Court has found that the United States attorney may, constitutionally, **elect** to prosecute a given act of filing a false return under **either** Section 145(b) or Section 3616(a), there is still an important Federal

question which must be settled by this Court: Where the indictment charges a felony, but states facts sufficient only to constitute a misdemeanor, is the entire indictment invalid?

The Court has found a distinction between the felony of wilfully filing a false and fraudulent return with intent to evade taxes, and the misdemeanor of filing a false and fraudulent return wit hthe same intent.[1] If such a distinction exists, it must only be on the basis that there are some **aggravating elements** present in the felony cases which are not present in misdemeanor cases—logic and the case law do not permit of anw other conclusion. In the landmark case of **Spies v. United States**, 317 U.S. 492, this Court suggested that such elements might consist of:

> "*** conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income; handling one's affairs to avoid making the records usual in transactions of the kind and any conduct the likely effect of which would be to mislead or conceal.***" 317 U. S. 499.

If, however, such elements are necessary to make the felony proscribed by Section 145(b), then such elements **must be stated in the indictment.** Thus, in the leading case of **Aderhold v. Pace**, 65 Fed. 2d 790 (C.A. 5, 1933), a prisoner was discharged after serving less time than the offense for which he had pleaded guilty. The Court said:

[1] Congress did not eliminate the words "with intent to defeat or evade" from former Section 3616(a) until it enacted Section 7207 of the Internal Revenue Code of 1954.

> "Any aggravation of an offense for which the law authorizes an increase of punishment must be stated in the indictment. 1 Bishop's Cr. Law, §601. Mr. Bishop also says that
>
> to punish one for all of a crime where only a part of it is charged is to punish him without accusation. 1 Bishop's Cr. Pro. §§ 77, 80, 84. So far as we are aware, there is no authoritative decision to the contrary. Certainly it cannot fairly or justly be said that Pace, because he pleaded guilty to a charge of selling an unnamed quantity of intoxicating liquor, thereby admitted he had sold more than a gallon." 65 F. 2d 791

This same rule is found in other cases: **Olivito v. United States,** 67 F. 2d 564 (C.A. 9, 1933); **Meyers v. United States,** 116 F. 2d 601 (C.A. 5, 1940).

In other words, an indictment must charge and state each and every element of an offense. **United States v. Standard Brewery, Inc.,** 251 U.S. 210, including any facts in aggravation, if such are necessary to make up the offense charged. **Jordan v. United States,** 233 F. 2d 362 (C.A.D.C. 1956); **United States v. Scarlata,** 214 F. 2d 807 (C.A. 3, 1954).

Here, the respondent has **by the terms of the indictment** elected to charge petitioner with a felony. However, the indictment does not state any facts which distinguish the act charged (filing a false return) from the misdemeanor of filing a false return. Thus, the indictment **does not** state a violation of Section 3616(a) and **cannot** state a violation of Section 145(b). In such circumstance,

the petitioner urges the Court that he was correct when he stated in his motion to dismiss that the indictment did not state facts sufficient to constitute an offense against the United States. This question must also be ultimately settled by this Court.

This Court recently (May 27, 1957) recognized that the filing of a false and fradulent return was a "classic method" of violating former Section 145(b). **Achilli v. United States**, 25 L.W. 4335. This Court did not say, however, that the offense was alleged in the absence of the essential allegations of aggravating circumstances. To so interpret this Court's recent decision would be tantamount to stating that murder could be alleged without alleging a killing, or that assault and battery could be alleged without an aggressive touching. An indictment containing only allegations of the filing of a false and fradulent return is or should be held to be defective as being too vague, indefinite and uncertain. Such allegations standing alone fail to state an offense against the United States within the purview of former Section 145(b), Internal Revenue Code of 1939.

REASONS FOR GRANTING THE WRIT AS TO QUESTION II

This Honorable Court's grant of certiorari in the **Costello** and **Achilli** cases came after the preparation and filing of petitioner's brief in the Court of Appeals below. After an adverse decision, petitioner timely filed a petition for rehearing in which he presented to the Court of Appeals the questions raised in this Petition. Together with the petition for rehearing was a motion to correct the record, under the Rules of the Fifth Circuit, for the

purpose of placing before the Court of Appeals Petitioner's motion to dismiss the indictment made in the district court. The Court of Appeals, quickly, summarily, and without hearing denied this petition (R. 275). Patently, the Court of Appeals could give no consideration to that which it did not permit to come before it.

Petitioner respectfully submits that this action of the Court of Appeals, in a case involving his liberty, is such a departure from the accepted and usual course of judicial proceedings within the meaning of Rule 19(b) of the Rules of this Court as to call for an exercise of this Court's power of supervision.

In the first place, the questions which the petitioner raised, and now raises, were jurisdictional questions — questions going directly to the power of the trial court to impose sentence upon petitioner. A jurisdictional question may be raised at any time—whether it was preserved below or not—at any stage of the proceedings. The Court of Appeals grieviously erred, under the circumstances, by refusing to consider these questions.

If no offense was charged against the petitioner (Question I) the trial court had no jurisdiction to try and sentence the petitioner.

The questions were preserved in the lower court by petitioner's motion to dismiss indictment, by his plea of not guilty, by his motions for judgment of acquittal and his motion for new trial. Failure to argue a point on appeal does not constitute a waiver, and petitioner's specification of error in the Court of Appeals numbered 10 and 12 (relating to judgment of acquittal), together with the

petition for rehearing itself, were sufficient to raise and preserve all of petitioner's contentions.

Perhaps most important of all, Federal courts, even this Honorable Supreme Court, have the power and duty to notice plain or jurisdictional error, even if not properly preserved. Rule 52(b), Federal Rules of Criminal Procedure, Title 18 U.S.C.; Rule 24(b), Rules of the Court of Appeals for the Fifth Circuit.

Here the Court of Appeals could not know whether or not there was any plain error or jurisdictional question, because it declined even to allow to be placed before it the portions of the record below necessary for a consideration of these questions.

It is respectfully submitted that in cases involving liberty, it is far to dangerous for this Court to sanction or permit this type of aloofness in a Court of Appeals. Petitioner should not be denied due process of law for any possible procedural errors of his counsel.

REASONS FOR GRANTING THE WRIT AS TO QUESTION III.

In the case at bar the Government had by its indictment and bill of particulars indicated that "the prosecution was based solely on the failure of the tax payer to include a single $45,000. item of income". (Opinion of Court of Appeals, Appendix Page 1). The petitioner concedes that even a prosecution based solely upon a taxpayer's failure to report one single item of income might under certain circumstances be sufficient to make out a violation of Section 145 (b). This would be the case if

the item were concealed, suppressed, unreported, or in some other manner hidden. In the case at bar, however, the factual situation was just the opposite, as the Court of Appeals might easily and conclusively have determined by a mere inspection of only one piece of documentary evidence, i.e., Government Exhibit 2 (1946 Federal Income Tax Return of the M. J. Harris Company) where the "fraud item" was plainly reported for all the world to see. The Petitioner submits that, in affirming a conviction under this factual situation, the Court of Appeals has acted contrary to the applicable decisions of the Supreme Court and of other Courts of Appeal, and has initiated what may well be a dangerous and highly undesirable trend.

The essence of the crime of income tax evasion is **concealment.** This was finally decided and put at rest by the decision of this Honorable Court in the landmark case, **Spies v. United States,** 317 U.S. 492 (1943). In this case the Supreme Court held that the failure to file an income tax return, regardless of what effect it might have on a defendant's tax liability, could not be the basis for a prosecution for tax evasion. This was so because the factual situation would lack the **positive act of concealment** necessary to make out "the gravest of offenses against the revenues ***". Thus, the failure to file a return, though it might seem to come within the meaning of the phrase "in any manner" found in the statute, did not in fact constitute one of the means by which the evasion might be accomplished. The Court, through Mr. Justice Jackson, said:

> "The Courts did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did

not define lest its efforts to do so should result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making records usual in transactions of the kind, and *any conduct, the likely effect of which would be to mislead or to conceal.* If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes, such as concealing of other crime." (Emphasis supplied) 317 U.S. 492, 499.

This pronouncement became the guide post for Courts of Appeal in determining when evidence was sufficient to go to the jury in tax evasion cases. For example, in the case of **Scheuermann** v. **United States,** 174 2d. 397 (C.A. 8, 1949) the Court sustained a conviction:

"*** because the evidence disclosed the usual badges of indicia **of the deliberate concealment of income,** namely: (1) Intentional failure to maintain financial records; (2) a much visited safety deposit box, rented under an assumed name; (3) the use by the defendant, in his dealings; of large sums of currency; and (4) pur-

chases of property by the defendant in others' names." 174 F. 2d 397, 398. (Emphasis supplied).

The same rule again appears in the case of **Battjes** v. **United States,** 172 F. 2d. 1 (C.A. 6, 1949.) The Court of Appeals upheld a conviction for income tax evasion in a case where the defendant **had failed to report** a payment of money or even refer to it in his return, or in any manner bringing it to the attention of the Internal Revenue agents. The Court of Appeals held the conviction should be sustained because the conduct showed the all important element of concealment.

" *** His failure to report the payment received in 1941 from the State of Michigan, together with the failure to refer to it in his return, or to bring it to the attention of the revenue agents with an appropriate explanation was properly before the Court on the issue of willful intent. In Spies v. United States, 317 U.S. 492, at page 499, 63 S. Ct. 364, 368, 87 L. Ed. 418, it was stated that 'affirmative willful intent may be inferred from conduct such as *** handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.' **The actual effect of Battjes' conduct was to conceal.**" 172 F. 2d 1, 5 (emphasis supplied).

One of the best discussions of the particular principles herein advanced by the Petitioner is found in an opinion by a District Judge, the distinguished Leon Yankwich of California. Thus, in the case of **United States** v.

Cole, 90 F. Supp. 147 (D.C.S.D. Cal. 1950), the Court granted a motion for a judgment of acquittal in an estate tax evasion case. In that case there was an estate tax return which was alleged to have been false and fradulent because certain shares of stock had been omitted from the return. The claim of the Government was that certain stock shares, consideration for which had been paid by decedent, were in reality an asset of the estate. The stocks had been **referred to in the return** as "owned by others" but had been omitted in computing the tax liabilities. In granting motions for judgment of acquittal the District Judge wrote an illuminating analysis of this Court's decision in the Spies case, which Petitioner herewith adopts as his own argument:

> "*** On certiorari, the Supreme Court (in the Spies case) held that this section (145(b)) and the kindred sections cover not mere failure to act as required by law,—but refer to attempts to defeat the purpose of the Act by **fraudulently concealing** matter which should go into returns, or by which, if reported would result in a tax. *** (emphasis by court)
>
> "*** (The court quotes the matter in the Spies case previously quoted in this petition).
>
> "In brief, the Court tells us that when the Congress spoke of 'willful' acts, they had in mind acts of the type which by common knowledge are done to 'conceal'."
>
> "If the facts are such as would have the effect of 'revealing', — to use the antonym of **con-**

ceal', — we are not in the domain covered by this section. All the cases decided since this decision was rendered had some of the elements of fraudulent concealment, to which the Court referred. (emphasis supplied).

"**** And a case should not go before a jury if the facts are only of a character which may lead to speculative conjectures. This is especially true in a case of this character, which requires a specific intent. — **the intent to defraud the Government.** (emphasis by court).

"The conclusion just announced, — on the basis of the law as applied to undisputed facts, is reinforced by the uncontroverted acts of the defendants, surrounding the filing of the return.

"Decisions dealing with the quantum of proof in these cases **require positive acts of concealment.** The falsification of books or other "paper" work, instructions to those in charge to hide money or assets, or to fabricate records. No such facts appear in this record. On the contrary, the return itself offers proof of opposite intent. Instead of concealing the certificate which was found in the box endorsed in blank, the defendants referred to them in the return as excepted stock 'which are owned by others.' This was notice to the Government, — if the Government needed any notice, — that there were items found in the box inventories by the representative of the State of California which

the executors had not returned as a part of the estate. (emphasis supplied).

"In the face of this, how can the Government maintain that there was concealment? For this is **revealment,** — just the opposite of **concealment.**" (emphasis by court) 90 F. Supp. 147, 152, 153, 158.

Other courts have similarly held that the highest revenue crime cannot be committed without sufficient evidence of concealment. **Spriggs** v. **United States,** 198 F. 2d 782 C.A. 9 1952. **United States** v. **Berman,** 75 F. Supp. 789 (D.C. N.D. Ga. 1947). **United States** v. **Carleton,** 138 Fed. Supp. 510 (D.C. W. D. Okla 1956).

The rule of the Spies case was again inferentially recognized by this Court in the case of **Holland** v. **United States,** 348 U.S. 171 (1954), when the Court stated that wilfullness could not be inferred from a mere understatement of income.

The Petitioner submits that there is completely lacking in the case at bar the essential elements of concealment which is necessary to make out an offense under Section 145(b). The only questioned item in this case—the real estate commission in the amount of $45,000. — was reported to the Government on the income tax return of the M. J. Harris Company. Assuredly, one does not **conceal** income by reporting it on an income tax return. This is in the words of Judge Yankwich—**"Revealment—** which is the opposite of **concealment."** It makes no difference for this purpose if the real estate commission was correctly or incorrectly reported as a matter of law.

Neither does it make any difference what the Petitioner's conduct may or may not have been in years prior to the year under prosecution. The significant fact is that the sum alleged to have been fraudulently omitted from the Petitioner's income tax return was not hidden, not concealed, not suppressed; there were no secret transactions, hidden deals, double set of books, surreptitious handling of cash, falsifying of records, nor any of the other standard or traditional indicia of fraud.

Rather, this amount is plainly stated on an income tax return for all the world to see, and especially for the Government's auditors to see. It must be remembered that at the time the return in question was filed, March 5, 1947, (R 1) the Petitioner had already been under investigation for nine months, for income tax for prior years (R 54, testimony of Government witness Nisensen) and was well aware of this act. Thus, there could have been no doubt in either the Petitioner's mind or the mind of the Revenue Department, that the 1946 income tax returns of both the Petitioner and his wholly owned corporation would soon be subject to close scrutiny and analysis by the Government's agents.

We respectfully submit that the Court of Appeals in sustaining this conviction has committed a grievous and dangerous error and is in conflict with this Court's opinion in the **Spies** case. A close reading of the opinion of the Court of Appeals will indicate most plainly that the Court's expressed indignation at Petitioner's conduct for prior years has caused it to ignore and depart from these well settled principles. Indeed, a sustaining of a conviction under these circumstances might well lead to a most dangerous and undesirable situation wherein any error on

a tax return, such as the misdesignation of ordinary income as capital gain, the over-estimation of depreciation, of the mistaken attribution of the income might well be prosecuted as tax evasion, for there can be scarcely any case in which **some** inference of wilfulness on the part of the taxpayer may not be drawn.

In view of the apparent increasing numbers of criminal prosecutions arising under the revenue laws; it is respectfully submitted that certiorari should issue so that the Supreme Court may consider this question and re-establish the necessity of concealment for the making out of a felony. Otherwise the most innocent error might, technically subject the taxpayer to prosecution for a felony.

REASONS FOR GRANTING THE WRIT AS TO QUESTION IV

The Petitioner invites the Court's attention to the portion of the facts in the case set out at pages 6, 7 infra. Petitioner urges this Court that the cited remark of the trial court relative to recommending sentence may at such time and under such circumstances as it was, have the effect of improperly inducing a verdict against the Petitioner and under circumstances amounted to a denial of due process and his right to trial by a jury guaranteed by Amendments V and VI of the Constitution; and that the Court of Appeals' unconcerned sanction of this act, and dismissal of Petitioner's complaint as mere trivia, constitutes such a departure from accepted and usual judicial standards as to call for an exercise of this Court's supervisory jurisdiction.

It is the settled law of practically all jurisdictions that, in a criminal case, any indication or action on the part of the trial court which may reasonably lead the jury to believe that a finding of Guilty will result in a suspended sentence, leniency, probation or early parole, is reversible error. **Demetree** v. **United States,** 207 F. 2d 892, (C.A. 5, 1953); **Smith v. United States,** 230 F. 2d 935 (C.A. 6, 1956); **Bryant v. State,** 205 Ind. 372, 186 N.E. 322 (1953); **People** v. **Sherman,** 35 N.Y.S. 2d 471 (1942); **Bethel** v. **State,** 162 Ark. 76, 257 S.W. 740, (1942); **People** v. **Covey,** 137 Cal. App. 517, 30 P. 2d 1010 (1934); **James** v. **State,** 77 Okla. Crim. 108, 139 P. 2d 202; **Andrews** v. **State,** Ark, 282 S.W. 2d 592; **Lawley** v. **State,** Ala., 87 So. 2d 433.

The recent case of **Smith** v. **United States,** supra, is a case strikingly similar on this point to the case at bar. There the Sixth Circuit found plain and prejudicial error in the following circumstances:

The jury returned, after deliberating for two hours, for further instructions, one of the members asking if the jury could write the words a "mitigating circumstance" in the verdict of Guilty. The Court said that this was not the type of case where this could be done, but said:

> "If *** you desire to make some recommendations to the Court along the lines you have in mind the Court will be glad to have such recommendations". 230 F. 2d 935, 940.

In reversing the Court said:

> "It is best simply to advise the jury that they have nothing to do with the penalty. Here the

judge not only charged that the penalty could be as light as $1.00 and the prison sentence as short as one day, but also stated that he would be glad to receive the jury's recommendation of leniency. He added that it was usual to sentence after hearing and after full investigation, yet as soon as the jury's recommendation of leniency was received sentence was imposed and the defendants received a severe punishment. At least one member of the jury at the time of the colloquy with the court was hesitating as to his final decision. We think the error was prejudicial." (230 F. 2d 935, 940).

Petitioner has urged the Court of Appeals that his complaint in this case presented an even stronger showing of error than did the **Smith** or **Demetree** cases cited, and asked for a reversal on that ground. The Court of Appeals summarily dismissed this claim with the holding that the remark of the trial court was "not *** calculated to induce a verdict of Guilty, citing as authority therefor a case in no wise related to the question. (See Appendix Page 11).

The Petitioner submits that, in so lightly passing off Petitioner's contention in this regard, the Court of Appeals has sanctioned a grave error by the trial court which will tend to create a highly undesirable precedent for the conduct of jury trials in Federal courts. In the case at bar the trial court's remark as to sentence was not even responsive to the question concerning "wilfullness" put to him by the jurors, but was volunteered by the Court. The circumstances under which it was made, and the inquiry which was the basis of the statement, showed plainly that

the jury was at this time entertaining grave doubts as to the wilfullness of the defendants and were reaching in all directions for some basis for compromise. This basis the judge obviously supplied them, for the verdict was that of Guilty with a "strong recommendation for clemency". (R. 217). It makes no difference whether an exception was taken to this remark or not, although counsel for the Petitioner contends that the point was preserved to them (R. 210) and that the Court of Appeals was incorrect in holding that Petitioner's counsel opposed correction. Regardless, however, this remark is not an instruction to which an exception should be required under Rule 30, Fed. Rules of Crim. Proc. Title 18 U.S.C. It was rather an open inducement to render a verdict upon the Court's implied promise that the recommendation therein would be observed.

This is a serious question touching upon the conduct of every single criminal case tried in the trial courts. If allowed to stand unchallenged, the decision of the Court of Appeals will present an injurious chipping away of a defendant's right to have his guilt impartially determined by a jury solely upon the basis of the facts.

It is respectfully submitted that certiorari should issue to review this matter.

CONCLUSION

For all of the four above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR B. CUNNINGHAM,

PHILIP T. WEINSTEIN,
Attorneys for Petitioner.

May, 1957.

PROOF OF SERVICE

The undersigned, of counsel for the petitioner in the within Petition for Certiorari, hereby certifies that four copies of the above and foregoing Petition for Writ of Certiorari has been served upon the Honorable J. Lee Rankin, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and upon Honorable James L. Guilmartin, United States Attorney, Federal Building, Miami, Florida, this ——— day of June, 1957.

(APPENDIX "A")

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16074

MILTON J. HARRIS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 9, 1957.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment of guilty and sentence following a jury verdict finding that the appellant "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946 . . . ."

The principal ground of appellant's appeal is the admission by the trial court, over objection, of evidence

tending to show that certain deductions claimed by the taxpayer were duplicated as deductions claimed by his wholly owned corporation after the Government had, by its bill of particulars, indicated that the prosecution was based solely on the failure of the taxpayer to include a single $45,000 item of income. There are other contentions as to alleged improper admission of evidence as to prior years and incorrect charge to and comments to the jury.

Soon after the indictment was returned the appellant filed his motion for a bill of particulars which the trial court granted in part.[1] It is apparent that the defendant

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[1] In view of the great stock appellant takes in the matter of the Bill of Particulars, it is necessary to point out precisely what he requested by way of particulars and what the court directed the Government to furnish:

The motion asked for particulars as follows:

"1. The nature, or kind of each item and the amount of each claimed by the Government as making up the total gross income claimed by the Government to have been received by the Defendant in the year 1946.

"2. The type and amount of each deduction against the total gross income of the defendant for the year 1946, allowed in computing the alleged net income of defendant for said year;

"3. The type and amount of each deduction by defendant in his income-tax return for the year 1946, which has been disallowed in computing the alleged net income of defendant for said year;

"4. Whether it is claimed that defendant wilfully withheld or omitted from his income-tax for the year 1946, item and amount of income, and if so, the nature and kind and the amount of each claim.

"5. Whether it is claimed that defendant wilfully and knowingly deducted from his gross income for the year 1946, items which were not legally deductible, and if so, the nature and kind of such illegal deductions and amount of each such item."

The court granted the motion as to the following:

"2. That motion of defendant for bill of particulars is hereby granted, and the plaintiff, United States of America, shall submit to the defendant particulars in the following form and the substance:

asked for and got an order requiring particulars as to the items making up the gross income and of deductions allowed or disallowed *in determining the net income which is charged against the defendant.* The court refused to require any answer from the Government as to "whether it is claimed that defendant wilfully and knowingly deducted from his gross income for the year 1946 items which were not legally deductible, and if so the nature or kinds of such items."[2]

During the course of the trial there was evidence that amply authorized the jury to find that Harris individually earned and collected in 1946 a $45,000 real estate commission and that he did not include it on his personal income tax return for that year filed in Miami, Florida. The Government then produced evidence to the effect that this amount was reported on the tax return of the M. J. Harris Company, a Cleveland, Ohio corporation, which had a net loss for the year of over $39,000 (including loss carry-overs from 1944 and 1945), after including the item of $45,000. It thus became apparent that if the $45,000 item

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"(a). The general category and amount in each general category making the gross income alleged to have been received by the defendant for the calendar year 1946;

"(b) The general category and amounts allowed or disallowed by the Government *in determining the net income which is charged against the defendant.* Included in this shall be personal expenses allowed or disallowed, stated in a general category." (Emphasis added.)

2 The Government's response to the motion was in the following terms:

"Answering Paragraph 2 of the order as follows:

"(a) Net Gain from the Sale of Capital Assets	$23,163.83
Insurance Agency Fees	710.98
Real Estate Commissions	45,000.00
(b) Operating Expenses Allowed Per Return	28,714.28
Contributions, Real Estate & Sales Taxes Allowed	814.01"

was truly income to Harris he would profit by returning it as income to the corporation, because on account of the claimed loss position of the corporation it would owe no tax on it at all.

In order to prove the element of wilfulness which is an ingredient of the offense charged, the Government undertook to prove several things that were calculated to show that this was not a mere unintentional mistake by Harris. That it was such a mistake, of course, however much it benefitted him taxwise, would be a defense to the criminal proceedings if believed by the jury. It is the offer and admission of this proof that is the basis of appellant's principal attack here.

The first serious objection on the trial came when the Government sought to prove, as it did, that of the $28,714.28 of deductions claimed by Harris on his personal return, $17,605.16 of them were also claimed by the M. J. Harris Company as deductions for the same calendar year. This was proved by an analysis of Harris' personal expense sheet and of the company's expense sheet. Identical expenditures were found to have been entered on both records and were taken as deductions in the returns signed by him in one instance as an individual and in the other as president of the corporation.

The defendant vigorously assailed the action of the trial court in permitting any mention to be made of "deductions." He contended that the Government's bill of particulars admitted the deductibility of the $28,714.28

and that it would be improper for the court to permit the Government in any way to attack the validity or bona fides of a single dollar of the expenditures comprising this sum.

Upon the Governments representation that it proposed to show double deductions—once by Harris individually and once by his corporation—the court admitted the evidence solely as proof of the taxpayer's intent to defraud.

The court cautioned the jury on several different occasions that this evidence was not to be considered by them as proof of the correct amount of taxable income, but was admitted only as a circumstance to show Harris' intent in attributing the $45,000 income item to the corporation.

There is no merit in the appellant's criticism of the action of the trial court in this respect. In the first place it is to be noted that the court declined to require an answer to defendant's inquiry whether he wilfully and knowingly deducted items which were not legally deductible, but only required, as to deductions, that the Government show the amount of deductions allowed or disallowed in computing the net *income* of the taxpayer. This circumstance, of itself, was ample notice to defendant that the Government would not be precluded from attacking the defendant's alleged practice of taking the same deduction twice. This, of course, could only be shown by proof of the deductions taken, which proof the defendant objected to. Moreover, if the bill of particulars had not been

granted as to only a part of the inquiries made by the defendant we are satisfied that there is no rule of law that would have prevented the Government from showing, if it could; that some of the deductions were of a highly suspicious nature, not in an effort to increase the deficiency in the tax, but to show the defendant's knowledge and thus his intent as to what he was doing when he incorrectly attributed the income item to that taxpayer which had an excess of deductions over income. There is nothing in the case of *Bryan v. United States* (5 Cir.), 175 F. 2d 223, or the case of *United States v. Neff* (3 Cir.), 212 F. 2d 297, relied on by appellant, contrary to what we hold here.

The Government also tendered, and appellant objected to the introduction, of testimony in the form of a statement signed by the appellant following a question and answer session with a special agent. This evidence included statements that the accused had not filed any personal income tax returns since "the thirties" because, as he stated, he had been advised by the revenue agent that if he operated all his business and paid all his personal expenses through a corporation he need file only a corporation return. The statement also included an explanation by Harris of why he split a certain payment into five parts and opened five separate bank accounts, and also an explanation that he guessed he had failed to report a large payment "because I was up to my neck in marital troubles and stayed away from Cleveland and my records." Other evidence objected to included testimony by the agent that

Harris had told him this story and that he had advised Harris as to the true requirements.[1]

There was also testimony objected to by appellant to the effect that substantial disbursements, carried as deductions from income, represented payments to Harris' wife and mother-in-law and some represented payments to rare stamp dealers.

We think the court properly admitted all of this evidence for the purpose of showing the defendant's knowledge as to his obligation to return and his wilfulness in evading this obligation and pay income taxes. In view of his statement that he had a corporation that paid his personal expenses but that he nevertheless made no personal return, it was certainly competent for the Government to show the personal nature of some of the payments made

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1. The testimony showing that Harris had not filed any personal returns and that he was advised with respect to the need to file a personal return showing personal income follows:
"A. He [Harris] stated that his returns had been examined some time in the early thirties by an examiner whose name he couldn't recall, and who he could not identify in any way, and that he had been told inasmuch as he was operating his business through a corporation and he was the sole owner of the corporation that it would not be necessary for him to file personal income tax returns inasmuch as the corporation also paid all his personal expenses, and so he discontinued filing Form 1040, the individual tax return.
"Q. Did you have any further discussion concerning furnishing tax returns?
"A. Yes, I told him that whoever had told him that had obviously misinformed him, and that even though he operated as a corporation that corporation was separate and distinct from himself as an individual; that it was required of him that he file personal income tax returns, and anything the corporation disbursed for his benefit, or to him, or for him, was income to him personally and should be reported by him on an individual income tax return." In a signed statement defendant answered agent's question as follows:
"Q. Were you aware it was taxable income?"
"A. I never even thought of it. I made up my own income tax."

by him to demonstrate how fantastic his claimed understanding of the law really was. Moreover, his personal return which is the basis of the indictment carried the statement that he had filed a return for the year 1945. The Government, of course, should be permitted to prove this statement to be false by showing that he had filed no personal return for 1943, 1944 or 1945, which proof defendant also objected to.

There is no merit in the appellant's criticism of the admission of the signed statement on the ground that it contained hearsay. An admission signed by the accused that is relevant to the issue being tried is, of course, an exception to the hearsay rule. While cautioning lower courts that such admissions, if a critical part of the Government's case, must be corroborated to be admissible, the Supreme Court has expressly held them admissible as an exception to the hearsay rule:

> ". . . . . Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination. They are competent as an admission against interest."
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> *Opper v. United States*, 348 U.S. 84 at 90.

See also *Monroe v. United States* (5 Cir.), 215 F. 2d 81, cert. denied, 348 U.S. 914, where we stated at page 83:

> "Admissions which are voluntarily made without any false promises or inducements are competent evidence against one charged with crime. In re White, D.C., 98 F. Supp. 985."

The fact that the questions put by the revenue agent embodied statements of fact does not make the questions inadmissible, since they were made to the accused and he responded to them. Neither, of course, is there any basis for appellant's objection to the agent's testifying on the trial itself as to conversations with the accused regarding his failure to file returns for prior years. It was clearly possible for the jury to infer from the fact that Harris had stated he paid all his personal expenses out of his corporation and that he refrained from filing personal returns not because he had no taxable income, but because he didn't think he had to, that he had sufficient income during the prior years to require the filing of a personal return. Especially is this true in light of the statement that he "was making $4200 every two weeks for five weeks and I opened up a new account in five different banks because I knew each account was insured up to $5000. Then when I got the Sylvania money *I took enough* to make each of the accounts $5,000 and left the balance in the Cleveland Trust." (Emphasis added.)

It also appears on his corporate records that he paid alimony of at least $500 in 1943 and of $2400 in 1945, which he charged to fees and salaries.

All in all there is ample evidence from the statements made by the accused to the agents and from his own personal and corporate records that for the years 1943 through 1945 Harris had sufficient personal income to require him to make a personal income tax return for those years, and the proof that he did not do so is relevant and admissible to show his knowledge of his obligation and

his intent to defraud the Government in defeating and evading it. We will not review at length the rule of law which permits the introduction of such evidence in a case in which intent is an ingredient of the offense charged. In *Lloyd v. United States* (5 Cir.), 226 F. 2d 9, we reaffirmed the expression of the doctrine as set forth in the opinion on motion for rehearing in *Weiss v. United States* (5 Cir.), 122 F. 2d 675, 682, 689, where we said:

> "Let us consider the theory upon which such evidence is admissible. The general rule is that evidence of another crime unconnected with the one on trial is inadmissible, but this rule is subject to a number of exceptions, the first of which is that evidence of other offenses by the accused is admissible to show his criminal intent as to the offence charged, where the other offenses are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged, where the other offenses are evidence of a separate crime tends to explain, illustrate, or characterize the act charged when such act is capable of more than one construction. Another is to rebut a claim of mistake or inadvertence. An exception also applies where the crime charged is one of a series of swindles or other crimes involving a fraudulent intent, or where the crime charged is part of a plan or system of criminal action. It is clearly admissible in prosecutions for obtaining money by false pretenses. The length of time over which an inquiry as to other offenses may extend is within the sound discretion of the trial court."

We think there is no merit in the appellant's criticism of comments made by the trial judge to the jury on the two occasions on which the jury requested additional instructions. From the court's charge as a whole and in the admonition that there could be no conviction without a finding of wilful intent, we think the jury was properly and correctly advised on the function of the jury and also as to the meaning of "wilful" as used in the statute and the indictment. The voluntary addition by the court to a supplemental instruction of the statement "You can recommend as to sentence if you want to, but beyond that you cannot do anything," was not, under the circumstances of the trial, including the charge and the supplemental discussion, calculated to induce a verdict of guilty. Cf. *Forster v. United States* (5 Cir.), 237 F. 2d 617. Moreover appellant's counsel made no objection to this comment by the court. In fact, on a reappearance of the jury seeking additional instructions when Government counsel suggested to the court that it admonish the jury that the matter of sentence was completely out of their hands, appellant's counsel objected and the court left the matter without further instructions.

If the defendant's counsel had any specific objection to the charge as to wilfulness as given it was not called to the court's attention on any of the several occasions afforded them by the court to perfect the charge. The charge as given was fair and clear and contained no prejudicial error.

The remaining points made by appellant here are, we think, not sufficiently significant to merit separate treatment. They have each been carefully considered and are rejected.

The judgment is AFFIRMED.